

## Navigating the legal complexities of kinship foster care

Elisa Reiter and Daniel Pollack | September 27, 2022



To serve as a foster parent, an individual must be vetted. When a placement involves placement with next of kin, the vetting process is a bit different. In the recent case of *B.B. v. Hochul*, a class action suit was filed against Hochul in her official capacity as governor, and Sheila J. Poole, in her official capacity as Commissioner of the New York State Office of Children and Family Services (OCFS). The plaintiffs were seeking to question the constitutionality of the process for screening kinship placements and the traditional grounds for rejecting a kinship placement.

Two state government agencies, and their policies are challenged in this case: the Office of Children and Family Services (OCFS) and the Administration for Children's Services (ACS). These state government agencies provide child welfare, juvenile justice and early care and education services. The agencies' goals include "protecting and promoting the safety and well-being of New York City children and families."

Thousands of children are removed from their families by ACS each year due to allegations of neglect or abuse. Following removal, the children are placed in the custody of ACS. ACS is then charged with notifying the children's potential kin to determine options for the child(ren)'s care. Alternatives include the child(ren)'s kin seeking certification as a foster parent, or seeking approval to adopt the children.

"Kin" is defined under New York state law as "any individual related to a half-sibling of the child through blood, marriage or adoption, and where such person is also the prospective or appointed relative guardian of such half-sibling or an adult with a preexisting positive relationship with the child including, but not limited to, a step-parent, godparent, neighbor or family friend."

The evaluation of kin includes a request for fingerprints from the applicant seeking placement of the children, as well as of any other adult who resides in the kin's home. ACS then submits those fingerprints to the New York State Central Register of Child Abuse and Maltreatment (SCR) regarding the applicant, as well as on any other adult who resides in the same household.

SCR maintains records on individuals who have been investigated for child abuse or neglect, and those records are maintained by OCFS. When ACS receives fingerprints and records on the applicant, that data is provided to OCFS.

OCFS requests a criminal history check of the applicant and of any other adults residing in the applicant's home from the New York State Division of Criminal Justice Services and the Federal Bureau of Investigation.

Once that information has been gathered, OCFS sends ACS any applicable information gleaned on the applicant's criminal history. OCFS advises ACS regarding whether the application should be denied, abated, or whether the application should proceed.

There are three potential grounds to deny an applicant certification as a foster parent or to deny the applicant's request for approval to adopt pursuant to New York's disqualification systems: (1) mandatory disqualification system, (2) discretionary criminal history disqualification system; or (3) SCR disqualification.

Mandatory disqualification is outlined in New York Social Services Law ("NYSSL") §378-a(2)(e)(1), and includes applicants convicted of certain listed felonies:

an application for certification or approval of a prospective foster parent or prospective adoptive parent shall be denied and...an agreement to provide payments to a prospective successor guardian...shall not be approved...where a criminal history record of the [applicant]...reveals a conviction for:

**(A) a felony conviction at any time involving:**

- (i) child abuse or neglect;
- (ii) spousal abuse;
- (iii) a crime against a child, including child pornography; or
- (iv) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery; or

**(B) a felony conviction within the past five years for physical assault, battery, or a drug related offence[.]**

OCFS tagged 300 felonies that merit lifetime mandatory disqualification for the purposes of kinship placement. Let's consider an applicant who manages to sail through the mandatory disqualification system. Their application may still be denied based on the discretion of ACS if the applicant, or any person over the age of 18 residing with the applicant, has a criminal charge or conviction.

OCFS and ACS do not provide exact guidelines regarding how ACS should exercise its discretion in determining who should be disqualified discretionally. However, OCFS requires that ACS must provide applicant(s) with a written notice setting out the basis for any disqualification.

Moreover, ACS must offer to meet with the applicant. In addition, an applicant may be disqualified if the applicant is over the age of 18 and has been "the subject of an 'indicated report' in the New York State Central Register of Child Abuse and Maltreatment, where the applicant was investigated for child abuse or neglect."

Even if an applicant is not qualified to be certified as a foster parent nor approved to be an adoptive parent, ACS may still allow the child(ren) to be placed directly with the applicant, also known as a “kin caregiver.”

More than 16,000 children in New York State have avoided foster care and placed directly with kin caregivers since 2012. Direct placement with a kin caregiver is considered temporary, leaving the child at risk of being removed from the kin caregiver, and then being placed with a “stranger or in a group care setting.”

While foster care providers and those approved to adopt are eligible for certain stipends, kin caregiver who have been determined to be “disqualified from being certified as a foster or adoptive parent are ineligible to receive Childcare Services and Supports.”

What type of support could the kin caregiver receive had they been approved? There are financial and other services that kin caregivers are not privy to, including:

...maintenance payments intended to reimburse the family for the cost of caring for the child and various allowances that benefit the child, such as funds for transportation, clothing, school related expenses, and miscellaneous expenses. Typical services include coordination and provision of services for the child’s medical, mental health, and scholastic needs, and training to assist in providing the proper care for the child. Additionally, children in foster care are automatically eligible for Medicaid.

If a kin caregiver has the good fortune to be approved as an adoptive parent, such a kin caregiver receives benefits including:

an adoption subsidy, caseworker supervision during the adoption process, and postadoption services, including counseling, caregiver training, clinical and consultative services, and access to community support services. Adoptive parents are also eligible for an adoption tax credit.

In this lawsuit, the listed plaintiffs include:

1. **B.B.** ACS removed B.B. from his mother's care in February 2018. He was immediately released to Mr. and Mrs. R., his maternal great grandparents. Around six months later, Mr. and Mrs. R sought certification as foster parents. ACS initiated a foster care certification review two months later. In April, 2020, ACS more than two years after being placed with his maternal great grandparents, Mr. and Mrs. R were advised that Mr. R. was mandatorily disqualified due to Mr. R having a conviction for attempted burglary in the second degree 25 years earlier. B.B. continues to reside with his maternal great grandparents, who ACS acknowledges that Mr. and Mrs. R, meet all of B.B.'s "medical, emotional, and physical needs." Mr. and Mrs. R subsist on a fixed income, and their situation would be improved if they could receive Childcare Support and Services.

2. **T.R.** ACS removed T.R. from his biological parents' in January, 2021. The child was placed in a youth reception center and subsequently placed in a foster home. When T.R.'s was removed, T.R.'s maternal grandmother, Ms. K expressed an interest in caring for T.R. That same month, ACS advised Ms. K that it would not certify her as a foster parent for T.R., as a result of an incident some 20 years earlier that was on Ms. K's SCR report as well as three Domestic Incident Reports ("DIR"). Later,

although Ms. K was denied foster parent certification, T.R. was placed with Ms. K, his uncle, and cousin. Ms. K does not receive Childcare Supports and Services. She struggles to meet T.R.'s financial needs, and fears that T.R. will be removed from her care at any time.

**3. Z.W. and D.W.** ACS removed Z.W. and D.W. from their parents' home in August, 2019. After the removal, Z.W. and D.W. were placed with their maternal uncle, Mr. P, and his partner, Ms. G. Mr. P took the appropriate steps for foster parent certification for Z.W. and D.W. ACS would not pursue the evaluation, as Mr. P had a May 2019 charge for Driving Under the Influence. Z.W. and D.W. reside with Mr. P. and Ms. G. ACS determined that the children were comfortable and bonded with Mr. P and Ms. G and that the agency had no concerns regarding "safety factors." (Id.) Mr. P. and Ms. G are struggling financially; they too are concerned whether the children's temporary placement will hold.

**4. C.W.C.** ACS removed C.W.C. from her mother's care in August 2020, and placed her with her maternal grandmother, Mrs. G. (Compl. ¶ 73.) Mrs. G. applied for foster parent certification for C.W.C.; however, ACS concluded that Mrs. G. could not be certified because a child was alleged to have been injured in her home when she previously served as a foster parent. In March 2021, Mrs. G "received a letter in March 2021 indicating that the allegation of the foster child's injury was unfounded". C.W.C.'s placement status was changed to a direct placement with Mrs. G, and C.W.C. continues to live with Mrs. G. Mrs. G. is on a fixed income; her status as to Childcare Supports and Services remains unchanged.

**5. J.S. and S.S.** ACS removed J.S. from his parents in March, 2018. His younger sibling was born the next month; both children were placed

with their maternal grandmother in April, 2019. Two months later, ACS advised Ms. S that she could not be certified as a foster parent due to her criminal history, which dated back approximately thirty years. Ms. S. provides for the children, despite being ineligible for Childcare Services and Supports.

There are additional plaintiffs who have similar stories. The additional plaintiffs also have had children placed in their care, for extended periods of time, notwithstanding the care providers having limited incomes, and someone in the household that had some type of history deemed unworthy of certification as a foster parent and/or adoptive parent.

Does the existing law serve the best interests of children, or does it allow government agencies to place children with kin, and simply save New York State money by denying those caregivers financial support that the caregivers need? Standing is the first issue addressed by the court. The plaintiffs contend that they were injured as a result of New York State and its agencies violating three fundamental rights, to wit:

...constitutional rights arising under the Fourteenth Amendment: the right to family association and integrity; the right to be free from unreasonable and unnecessary intrusions into their emotional well-being; and the right to not be maintained in government custody longer than is necessary, including unreasonable duration of foster care.

The court held that the defendants' motion to dismiss had merit, concluding that the plaintiffs failed to meet the threshold criterion of showing that they had standing to bring this suit.



Regarding the plaintiffs described above, as well as regarding the remaining plaintiffs, as the children remain in the care of their family members, the appellate court concludes that “there can be no deprivation of the kin caregiver ‘s interest in the care, custody and management of the children,” and therefore, no infringement on the constitutional right to freedom of family association and integrity.

While the plaintiffs argue that they fear that the children placed in the care of the named parties may be interrupted, none has presented evidence in support of an allegation that there is an “imminent risk that the directly placed plaintiffs will be removed from their current kinship placement.” Characterization of the placements as “temporary” is deemed insufficient to make the requisite showing of injury or harm.

The court concluded that the plaintiffs fail to maintain their duty to provide evidence of traceability. Traceability “focuses on whether the asserted injury could have been a consequence of the defendant rather than being attributable to the ‘independent’ acts of some other person not before the court.”

Regarding the plaintiff’s assertion that they have the constitutional right to be free from harm:

...under the Fourteenth Amendment, the Government must provide to those individuals in its custody “reasonably safe conditions of confinement and general freedom from undue bodily restraint.” This right to be ‘free from harm’ reaches the right to ‘essentials of care such as adequate food, shelter, clothing and medical attention,’ and appropriate conditions and duration of foster care. This right also includes the right to be free from psychological, emotional, and developmental harm. ... ‘A

child's physical and emotional wellbeing are equally important. Children are by their nature in a developmental phase of their lives and their exposure to traumatic experiences, can have an indelible effect upon their emotional and psychological development and cause more lasting damage than many strictly physical injuries.'

The court also addressed the concept of *prudential standing*. In order to comply with the prudential standing requirement, a plaintiff must assert "his [or her] own legal rights and interests... and cannot rest his claim to relief on the legal rights or interests of third parties."

There is an exception as to third-party standing, which applies only when a plaintiff may demonstrate "(1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests."

The court concluded that the plaintiffs failed to fulfill their burden of proof under the prudential standing doctrine. While the plaintiffs and kin caregiver have a close relationship due to familial ties, the plaintiffs failed to prove that "there is a hindrance or barrier for the kin caregiver to assert their rights in court and to protect their own interests by challenging defendants' policies as applied to them." The plaintiffs failed to show that the defendants harmed them and therefore the court dismissed the plaintiffs' claims. The court held:

The truth of the matter is that the disqualification systems Plaintiffs complain of are a workaround that does not address any concerns regarding the safety of the children, *but only to deprive them of the money, making children worse off*. Notwithstanding the Court's concern

with the viability of the disqualification systems at issue here, Plaintiffs in this case have not established standing.

Standing and jurisdiction are fundamental in all litigation. A plaintiff's lack of standing provides an ironclad defense to one's opponent. Based on Article III of the Constitution, federal courts are limited to hearing only justiciable "cases and controversies." Like all litigants, this puts the burden on kinship foster parents to prove that a court has jurisdiction over their case.

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